Neeta's Herbal (M) Sdn Bhd v Lim Bak Hiang

HIGH COURT (KUCHING) — SUIT NO 22–63 OF 1997–III(I)
IAN CHIN J
14 APRIL 2000

Trade Marks *— Passing off — Nature of interests protected — Defendant was exclusive distributor of plaintiff's products — Defendant subsequently also marketed other similar products — Whether defendant failed to protect and conform with plaintiff's intellectual property rights — Containers holding products were similar in size, colour and shape — Difference in logos and wordings on labels — Whether passing off proved*

On 16 December 1994, the plaintiff and the defendant signed a distribution agreement ('the agreement') and the defendant was appointed the exclusive distributor of the plaintiff's products within the state of Sarawak for the period ending on 15 December 1999. The agreement was terminated by the plaintiffs on 8 January 1997. The products to be marketed bear the plaintiff's registered trade mark of 'Neeta's Herbal'. The plaintiff took out the present action against the defendant for damages for breach of the agreement and for false representations. The plaintiff claimed, inter alia, that: (i) the defendant had failed to protect and conform with the plaintiff's intellectual property rights as the defendant had marketed her own products carrying the brand name 'Caryn' which the plaintiff alleged was an attempt to pass off her products as that of the plaintiff's; (ii) the defendant had also displayed a signboard with the words 'Caryn Hair Loss Treatment' without the consent and/or permission from the plaintiff; (iii) there was adulteration and/or tampering with the plaintiff's product; and (iv) the defendant had failed to place the minimum performance orders as the defendant had to purchase a minimum of RM15,000 worth of products every month from the plaintif. The defendant denied the breaches and counterclaimed for damages for wrongful termination. The defendant claimed for loss of profit for the remaining period of the agreement which the defendant alleged she would have earned if not for the termination of the agreement.

Held, dismissing the claim of the plantiff and also the counterclaim of the defendant:

(1) The pleading did not spell out in what manner the defendant had failed 'to protect and conform with the plaintiff's intellectual property rights' (see p 326C). Even though the containers holding the products and upon which those logos were fixed were similar in size, colour and shape, it was still not possible to pass one off as the other, given the difference in the two logos and the different wordings in those labels (see p 327A).

(2) The plaintiff had implicitly consented by her opening the outlet which bore the signage 'Caryn Hair Loss Treatment'. The court could not find any provision in the agreement as prohibiting the

use of the signage complained by the plaintiff (see p 328C–D). The only way the plaintiff could succeed, if at all, was to assert that there was an implied term of the agreement that the defendant shall not carry on other business or use other signages other than 'Neeta's Herbal' and this was not pleaded (see p 328F).

(3) In respect of the allegation of adulteration and/or tampering with the plaintiff's product, the unchallenged evidence showed that it was only after the product was sold in the same condition that it was received to the customers that the product was emptied into a plastic container. The provision in the agreement which governed tampering related only to the time before Neeta's products were sold and not thereafter. Clearly, a customer or the defendant could do what it likes, like replacing it with another plastic container a product it had bought (see pp 328I–329A).

(4) In respect of all the months prior to December 1996 which the defendant was alleged to have failed to meet the minimum order, the plaintiff had waived the minimum performance orders. The evidence showed that the plaintiff was happy with the performance of the defendant and that they had expected the sales to rise (see pp 330H–331A). Although cl 9.8 of the agreement merely restated the law that the plaintiff was entitled to afterwards insist on strict performance, what was not stated and what the law required was that there must be reasonable notice by the plaintiff to the defendant of their intention to demand strict compliance in the future (see p 331A–B); *Webb v Hughes* (1870) LR 10 Eq 281 and *Wong Kup Sing v Jeram Rubber Estate Ltd* [1969] 1 MLJ 245 followed.

(5) As to claim for loss of profit for the remaining period of the agreement which the defendant alleged she would have earned if not for the termination of the agreement, the defendant must establish at least the fact that the defendant was making such and such a sum when she was selling the plaintiff's products and thus if she had continued she would have made that sum. In the end, even if there was a breach of the agreement by the plaintiff, the defendant had not adduced any evidence of damages (see p 332D–H).

[Bahasa Malaysia summary

Pada 16 Disember 1994, plaintif dan defendan telah menandatangani perjanjian untuk mengedar ('perjanjian tersebut') dan defendan telah dilantik sebagai pengedar eksklusif produk-produk plaintif di dalam negeri Sarawak untuk tempoh yang akan tamat pada 15 Disember 1999. Perjanjian telah ditamatkan oleh plaintif-plaintif pada 8 Januari 1997. Produk-produk yang akan dipasarkan mempunyai tanda niaga berdaftar plaintif iaitu 'Neeta's Herbal'. Plaintif telah mengambil

tindakan ini terhadap defendan untuk ganti rugi pelanggaran perjanjian dan untuk representasi palsu. Plaintif telah mendakwa antara lain bahawa: (i) defendan gagal untuk melindungi dan mematuhi hak harta intelektual plaintif kerana defendan telah memasarkan produknya sendiri yang yang membawa jenama 'Caryn' di mana plaintif mengatakan adalah suatu cubaan kelirupaan produknya berbanding dengan produk plaintif; (ii) defendan juga telah mempamerkan papan tanda dengan perkataan 'Caryn Hair Loss Treatment' tanpa persetujuan dan/atau kebenaran plaintif; (iii) terdapat kelancungan (adulteration) dan/atau perubahan (tampering) ke atas produk plaintif; dan (iv) defendan telah gagal untuk membuat pesanan prestasi minima kerana defendan mestilah membeli secara minima produk-produk bernilai RM15,000 setiap bulan daripada plaintif. Defendan menafikan pelanggaran-pelanggaran dan menuntut balas untuk ganti rugi bagi penamatan secara salah. Defendan menuntut untuk kehilangan keuntungan untuk tempoh baki perjanjian tersebut di mana defendan mengatakan beliau boleh menperoleh pendapatan jika bukan kerana penamatan perjanjian tersebut.

Diputuskan, menolak tuntutan plaintif dan juga tuntutan balas defendan:

(1) Pliding tidak menyatakan bagaimana defendan telah gagal untuk 'melindungi dan mematuhi hak harta intelektual plaintif' (lihat ms 326C). Walaupun bekas di mana produk-produk diletak dan di mana logo-logo telah ditampal adalah sama dari segi saiz, warna dan bentuk, tiada kemungkinan keliru rupa antara satu dengan yang lain, memandangkan perbezaan kedua-dua logo dan perkataan-perkataan yang berbeza di atas label-label tersebut (lihat ms 327A).

(2) Plaintif secara tersirat telah bersetuju dengan membuka cawangan yang meletakkan tanda 'Caryn Hair Loss Treatment'. Mahkamah tidak boleh mencari sebarang peruntukan di dalam perjanjian sebagai melarang penggunaan papan tanda yang diadu oleh plaintif (lihat ms 328C–D). Hanya satu cara plaintif boleh berjaya, jika sekalipun, adalah untuk menegaskan bahawa terdapat terma yang tersirat perjanjian tersebut bahawa defendan tidak patut menjalankan perniagaan lain atau menggunakan tanda lain selain daripada 'Neeta's Herbal' dan ini tidak diplidkan (lihat ms 328F).

(3) Berkenaan dengan pengataan kelancungan dan/atau perubahan ke atas produk plaintif, keterangan yang tidak dipertikaikan menunjukkan bahawa hanya selepas produk dijual dengan keadaan yang sama di mana ia telah diterima kepada pelanggan-pelanggan barulah produk tersebut dimasukkan ke dalam bekas plastik. Peruntukan di dalam perjanjian yang meliputi perubahan bentuk hanya berkaitan dengan masa di mana produk Neeta dijual dan bukan selepas itu. Dengan jelas, seorang pelanggan

atau defendan boleh membuat apa yang beliau sukai, seperti menggantikannya dengan bekas plastik yang lain suatu produk yang beliau telah beli (lihat ms 328I–329A).

(4) Berkenaan dengan bulan-bulan sebelum Disember 1996 di mana defendan dikatakan telah gagal membuat pesanan minima, plaintif telah mengetepikan pesanan prestasi minima. Keterangan menunjukkan bahawa plaintif berpuas hati dengan prestasi defendan dan mereka menjangkakan bahawa jualan akan meningkat (lihat ms 330H–331A). Walaupun fasal 9.8 perjanjian tersebut hanya menyatakan semula undang-undang bahawa plaintif berhak untuk kemudiannya menegaskan pematuhan secara ketat, apa yang tidak dinyatakan dan apa yang undang-undang perlukan adalah bahawa mestilah terdapat notis munasabah oleh plaintif kepada defendan mengenai niat mereka untuk menuntut pematuhan secara ketat di masa hadapan (lihat ms 331A–B); *Webb v Hughes* (1870) LR 10 Eq 281 dan *Wong Kup Sing v Jeram Rubber Estate Ltd* [1969] 1 MLJ 245 diikut.

(5) Berkenaan dengan tuntutan untuk kehilangan keuntungan untuk baki tempoh perjanjian tersebut di mana defendan katakan beliau dapat memperoleh pendapatan jika bukan kerana penamatan perjanjian tersebut, defendan mestilah membuktikan sekurang-kurangnya fakta bahawa defendan telah memperoleh pendapatan tertentu apabila beliau menjual produk-produk plaintif dan jika beliau terus berbuat demikian beliau akan memperoleh jumlah tersebut. Akhirnya, jika terdapat pelanggaran perjanjian oleh plaintif sekalipun, defendan tidak mengemukakan keterangan ganti rugi (lihat ms 332D–H).]

Notes

For cases on nature of interest protected in passing off cases, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1231–1232.

Cases referred to

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151 (refd)

Webb v Hughes (1870) LR 10 Eq 281 (folld)

Wong Kup Sing v Jeram Rubber Estate Ltd [1969] 1 MLJ 245 (folld)

Ling Liang Chai (*Battenberg & Talma*) for the plaintiff.

Tony Ling (*HC Lee & Partners*) for the defendant.

Ian Chin J:

Introduction

Neeta's Herbal (M) Sdn Bhd ('the plaintiff') took out the present action on 26 July 1997 against Lim Bak Hiang ('the defendant') for damages for

breach of a distributorship agreement ('the agreement') and for false representations in connection with a range of cosmetic herbal products. The defendant denied the breaches and counterclaimed for damages for wrongful termination by the plaintiff of the agreement.

The plaintiff alleged that the defendant was in breach of the agreement in the following aspects:

(i) failing to protect and conform with the plaintiff's intellectual property rights;

(ii) displaying a signboard with the words 'Caryn Hair Loss Treatment' without the consent and/or permission from the plaintiff;

(iii) adulterating and/or tampering with the plaintiff's product;

(iv) conducting business in a manner prejudicial to the business and marketing of the plaintiffs product;

(v) failing to place the minimum performance orders;

(vi) commencing business in the State of Sabah without obtaining the prior written consent of the plaintiff.

The plaintiff claimed for loss of profit for the period for which the agreement was to run if not for the termination and this period is respectively 37, 38 and 39 months and involving the franchise areas of Sibu, Miri and Kuching. Those numbers of months were used as the multiplicand for the average monthly profit which the plaintiff had made for the products already sold to the defendant. The profit is alleged to be half the price of the products sold to the defendant. Thus, a claim of RM742,016.89 is made for loss of profit.

There is a further claim by the plaintiff for 'false representation' which is described as follows:

Holding out as the original manufacturer of the plaintiff's products by way of circulating advertisements and further causing to be published articles advertising the same in local newspapers.

The plaintiff had also prayed for the following reliefs:

(1) The return by the defendant of the following to the plaintiff:

(i) all plaintiff's products in the defendant's possession;

(ii) all plaintiff's samples and publicity material used in the business;

(iii) all original and/or copies of all documents and information in any form containing and covering in any way any part of the intellectual property of the plaintiff.

(2) Immediate cessation by the defendant of all use of the intellectual property of the plaintiff including signs and logos relating to the plaintiff's product and/or to cease carrying on the busines.

(3) An injunction restraining the defendant or her servants or agents from engaging directly or indirectly in any business venture in competition with the plaintiff and not to solicit the plaintiff's customers and/or former customers with the intent of taking their customers.

Facts of case and the disputes

On 16 December 1994, the parties signed the agreement under which the defendant was appointed the exclusive distributor to sell the plaintiff's products within the State of Sarawak for the period ending on 15 December 1999. The agreement was terminated by the plaintiffs on 8 January 1997. The products to be marketed bear the plaintiff's registered trade mark of 'NEETA'S HERBAL'.

Whether there was a failure to protect the plaintiff's intellectual property

Under cl 6.14 of the agreement, titled Protection of Intellectual Property, there are 13 obligations on the part of the defendant. The pleading did not spell out in what manner the defendant had failed 'to protect and conform with the plaintiff's intellectual property rights' or which of the 13 obligations the defendant had failed to perform. The defendant did not attack the pleading and this makes me wonder how an advocate would know what defence to prepare to meet the case of the plaintiff. However, the evidence at the trial did provide some indication as to what would be relied on. This consisted of the other products of the defendant sold under the brand name of Caryn. In his closing address, Mr Ling Liang Chai, learned counsel for the plaintiff, said this in relation to this matter of the protection of the intellectual property, viz:

> 14. The defendant after commencing the distribution of Neeta's Herbal products, had also sold and marketed her own products carrying the brand name 'Caryn'. Exhibits PFI and PF2 are to all intents and purpose an attempt by the defendant to pass off her products as that of the plaintiff's.
>
> 15. The colour scheme packaging including the bottle caps and label have confused an ordinary lay person that exhs PFI and PF2 are identical to exhs PEI and PE2.
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> 16. At p 8, line 16 of the notes of proceedings, PWI testified that the defendant had been selling similar products as that of the plaintiff.
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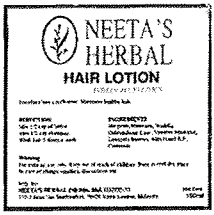
> 17. The defendant whilst testifying in court (see evidence of DW3 at p 33 line 26) said that the defendant carried only three products, namely, tonic, shampoo and hair cream, and confirmed that these similar products were also part of the plaintiff's range of products.

In so far as the logos are concerned, they are very distinctive and one cannot make any mistake as to their identification. I need only reproduce the respective logos to demonstrate why it is not possible to mistake one for the other, viz:

Defendant's Logo



Plaintiff's Logo

Even though the containers holding the products and upon which those logos were fixed were similar in size, colour and shape, it is still not possible to pass one off as the other given the difference in the two logos and the different wordings in those labels.

Whether there was a breach of the agreement in the defendant displaying a signage bearing the words 'Caryn Hair Loss Treatment'

The next controversy calls for a consideration of the circumstances leading to the signing of the agreement. The defendant said she signed the agreement in the house of Nita a/p Ramniklal Bhudardas Gosalia (Neeta), the managing director of the plaintiff company, on 16 December 1994 after being offered the Sarawak territory. She then set up the outlet in Kuching and this was ceremonially opened by Neeta on 6 March 1995 followed by a press conference which was reported in the newspaper the next day. The report, among other things, said Neeta's products are available at the defendant's outlet called 'Caryn Hair Loss and Beauty Treatment Centre'. The defendant said that a cutting of this news report was given to Neeta but Neeta denied seeing the news item on 7 March which I find difficult to believe. A person who took so much trouble to come all the way from Kuala Lumpur to Kuching in order to get the needed exposure for herself and Neeta's herbal products and for that purpose to organise and give a press conference must surely be interested in the result. The first thing one expects such a person to do would be to eagerly pour over the newspapers concerned to see the coverage given. There is no way that the person could miss the news item about herself and the products which appeared in the 7 March issue of the newspaper. Neeta is denying it for the purpose of maintaining her allegation that the defendant had displayed a signboard with the words 'Caryn Hair Loss Treatment' without her knowledge and consent. This display, the plaintiff alleged, is a breach of the agreement. The plaintiff contended that the signboard could not be in existence on 6 March 1995 since the official record says the registration of the firm name was only done on 8 May 1995 and it was stated that the business only commenced on 24 May. The only explanation and the most plausible one is that the business was commenced even before the firm name was registered. If that is not the case, the outlet could not have been opened by Neeta on 6 March and the newspaper report of 7 March would not have been able to report the following:

> ... The range of Neeta's herbal products available at the Caryn Hair Loss & Beauty Treatment Centre include ...
>
> Caryn Hair Loss and Beauty Centre is located at Lot 517, 1st Floor, Rubber Road, No 10, Satok ... Business hour is from 10am – 7pm daily except on Monday.

That this signage was by 6 March used cannot be disputed. This is also the evidence of Kho Boon Seng who testified that he, around March 1995, made the big signage hung facing the road at the first floor. He said the signage, apart from the words 'Caryn Hair Loss and Skin Care Treatment

Centre', also bore the logo of the plaintiff. He is supported by the evidence of Lam Bee Lian, a former employee of the defendant, who similarly testified to the existence of that signage. I do not see any reason not to accept her evidence. The defendant also testified, and which I accept, that there were two other signages relating to her business which were by 6 March put up. One was at the door leading to the first floor. The signage at the door reads: 'Caryn Hair Loss & Skin Care Treatment Centre Tues-Sun 10.00 am – 7.00 pm Monday – [C]lose'. This corresponded with what was reported in the newspaper and I cannot see how the plaintiff can argue that this signage was not there when she opened the premises for business on 6 March. The other signage by the wall was slightly differently worded: 'Caryn Hair Loss & Beauty Centre'. Again I have no reason to disbelieve the evidence adduced on behalf of the defendant that this signage was already there by 6 March. The plaintiff contended that the defendant had displayed 'a signboard with the words 'Caryn Hair Loss Treatment' without the consent and/or permission from the plaintiff'. From what I have set out, there is no doubt that the plaintiff had implicitly consented by her opening the outlet which bore the three signages. In any event, I cannot find any provision in the agreement as prohibiting the use of the signage complained of by the plaintiff. In arguing this issue, learned counsel for the plaintiff said this:

> The plaintiff further refers to cl 4.1.1 of the said agreement which allows the distributor to carry out the business using the name 'Neeta's Herbal'. The said agreement makes no mention of the defendant being allowed to carry out the business in the name of 'Caryn Hair Loss and Skin Care Treatment Centre'. To contend otherwise would defeat the intent and purpose of the said agreement.

That is an admission that the agreement does not expressly prohibit the use of the signages which the plaintiff complained of. That being the case, how can the defendant be said to be in breach of the agreement when there is no such prohibition? The only way the plaintiff can succeed, if at all, is to assert that there is an implied term of the agreement that the defendant shall not carry on other business or use other signages other than 'Neeta's Herbal'. This was not pleaded. Even if it was pleaded, it would still have to satisfy certain tests enumerated in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 before such a term can be implied. Learned counsel did not address the court on this point and I cannot see how I can conclude that such a term should be implied. The allegations that the defendant had breached the agreement continued, this time in relation to cl 6.28 of the agreement.

Whether the defendant had adulterated or tampered with the plaintiff's products

The evidence showed that a Neeta's product, a powder for hair treatment, was removed from its original packaging and placed in plastic containers marked with the identification of the numbers assigned to each customer who had bought the powder. The plaintiff contended that this is tampering.

A The allegation of adulteration is taken to have been abandoned since it was no longer mentioned in the closing address of learned counsel for the plaintiff. Clause 6.28 provides that the defendant shall not tamper with the products, viz:

> To sell the products in the same condition as that in which it receives them
B and not to alter or remove or tamper with them or any packaging supplied to the principal.

The unchallenged evidence shows that it was only after the product was sold in the same condition that it was received to the customers that the product was emptied into a plastic container. That provision
C relates only to the time before Neeta's products were sold and not thereafter. The condition of the products as shown in the photographs was that after it was sold. Clearly, a customer or the defendant can do what it likes, with a product it has bought like replacing it with another plastic container.

D Whether the defendant had conducted the business in a manner prejudicial to the business and marketing of the plaintiff's products

It is not surprising that the learned counsel who argued this ground conveniently skipped the mention of the particular provision in the agreement governing this matter because there is no provision at all that
E says the defendant should 'not conduct the business in a manner prejudicial to the business and marketing of the plaintiffs products'. It is also not in the pleading that such a term ought to be implied. Not only that, it is not spelt out in the pleading the particulars constituting the blameworthy conduct. That should be a sufficient answer to that claim. However, Mr Tony Ling, learned counsel for the defendant, did not approach the matter this way. He
F went to argue that what the defendant had done was not prejudicial to the business and marketing of the plaintiff's products. He also did not complain that he is left guessing as to what is the conduct that is called in question. In the end he only referred to the marketing of the products of the defendant side by side with that of the plaintiff and how only in cases where a customer
G could not afford the products of the plaintiff that the defendant's products were sold as an alternative. The plaintiff's products were sold in relation to a course of treatment requiring different kinds of the plaintiff's products whereas the defendant's products can be purchased as an individual item. The plaintiff's counsel did not point to any provision in the agreement which prohibits the defendant's selling her own products and therefore
H nothing that the defendant had done in relation to the sale of the products can be a ground for complaint. What more, when the defendant's products were offered to customers who cannot pay for the plaintiff's products. That is not the only subject of the complaint. In his closing address, plaintiff's counsel also referred to certain newspaper article and advertisement relating to the defendant and her products. There was no prior indication that this
I article and the advertisement would be the basis of the complaint under this head with the result that the defendant's counsel did not in his closing address touch on it. The short answer is, as I have said earlier, there is no

prohibition in the agreement that the defendant cannot carry on her business or sell her own products. Learned counsel for the plaintiff did not point to any such provision. I then now turn to the question of the failure to place enough orders for Neeta's products which is the only complaint needing serious consideration.

Whether the defendant had failed to place the minimum performance orders

Under cl 6.29, the defendant had to purchase a minimum of RM15,000 worth of products every month from the plaintiff for the two outlets. Again the statement of claim does not provide any particulars as to the alleged failure, like the important particular of the particular month in which the failure had occurred. After all, before the agreement was terminated by the plaintiff on 8 January 1997, the defendant had dealt with the plaintiff some 22 months, since March 1995. Which month, then, was the defendant alleged to have failed to order the minimum amount? It is not in dispute that the defendant did not purchase up to RM15,000 worth of the products for the months of April and July 1995 and October, November and December 1996. If the average of all the months from April 1995 to November 1996 is taken, it is also not disputed that the defendant did purchase the minimum amount. It appears to me that learned counsel of the plaintiff was aware of the hurdle created by the conduct of the plaintiff that may amount to a waiver of the term. But learned counsel dismissed it in these miserly few words: 'Even if there was a waiver (which is denied), the plaintiff was entitled to the enforcement of the terms and conditions of the said agreement (see cl 9.8 of the said agreement).' Clause 9.8 which the plaintiff relied on states:

> Waiver
> The failure of the Principal to enforce at any time or for any period any one or more of the terms of this agreement shall not be a waiver of them or of the rights at any time subsequently to enforce all terms and conditions of this agreement.

Amazingly, learned counsel for the defendant did not even take the cue from cl 9.8 to argue that the breaches were waived and no notice was given subsequently by the plaintiff of their intention to demand strict compliance with the minimum order provision. This came about, I think, because the defendant did not know what case she had to meet but yet there was no demand for particulars before the trial. Since the plaintiff had themselves raised the point and since the statement of claim did not state the minimum particulars to enable a defendant to meet the case, I am of the view that the reliance on cl 9.8 can be discussed and decided by the court. This is notwithstanding that the defendant's counsel was silent on this point. Clearly, in respect of all the months prior to December 1996 which the defendant was alleged to have failed to meet the minimum order the plaintiff had waived it otherwise they would not have continued to meet the orders of the defendant placed subsequent to the breach of the term of minimum order. The plaintiff had by such conduct indicated that they

would not enforce the provision relating to minimum order and the evidence shows that the plaintiff was happy with the performance of the defendant and that they expected the sales to rise. That was why there was hitherto no complaint whatever until the letter of termination in January 1997. As for December, it was the plaintiff who had refused to meet the order of the defendant. Clause 9.8 merely restates the law that the plaintiff is entitled to afterwards insist on strict performance but what is not stated and what the law requires is there must be reasonable notice by the plaintiff to the defendant of their intention to demand strict compliance for the future. Otherwise, you will get the absurd position of the plaintiff being considered having waived the provision this month but can insist on its observance the very next month. In my view, those cases (for example *Webb v Hughes* (1870) LR 10 Eq 281; *Wong Kup Sing v Jeram Rubber Estate Ltd* [1969] 1 MLJ 245) relating to waiver of time for performance and a reasonable notice to be given if there is insistence again on its observation apply to the present case. There is no such notice and instead the plaintiff abruptly terminated the agreement on 8 January 1997 after refusing to meet the order of the defendant for the products. Both learned counsels did not take me through the law concerning this point. The plaintiff also fails in this issue.

Whether it was a breach of the agreement for the defendant to have incorporated Caryn Hair Loss Treatment Sdn Bhd to carry on business in Sabah in competition with the plaintiff

The company (Caryn Hair Loss Treatment Sdn Bhd) was incorporated by the defendant on 14 December 1996 after the plaintiff had refused to supply their products to the defendant. It was formed to carry on business in Sabah but not to sell the products of the plaintiff since the plaintiff had refused to supply the same. This act, according to learned counsel for the plaintiff, was a breach of cl 6.13.1 which reads:

> To refer to the Principal any inquiries from prospective customers or other leads outside the Territory.

To constitute a breach of that clause, there must be evidence of 'inquiries from prospective customers or other leads' outside Sarawak. What, then, are the inquiries and who are the prospective customers for which it was alleged the defendant had failed to refer to the plaintiff? Learned counsel for the plaintiff obviously did not ask himself that question and consequently he did not provide an answer. Neither can the answer be found from the evidence as there was no indication as such.

Thus, the plaintiff's claim is dismissed. I turn now to consider the allegation of the defendant that the plaintiff had breached the agreement. Learned counsel for the defendant's only submission on this point is this:

> It is submitted that the defendant has not breached the distributorship agreement and therefore the plaintiff's termination of the said agreement is not justifiable.

But the pleading of the defendant alleged that the plaintiff had breached the agreement 'by failing and/or refusing to supply products to the defendant for a substantial period notwithstanding repeated written reminders to do so ...'. Surely, then learned counsel had to point out to the court what the evidence is that supports this allegation. He did not do so and instead just made the statement earlier quoted. What he had not done, learned counsel for the plaintiff did. He referred to the said order that was not met by the plaintiff but he contended that a confirmation for the order must be made before the plaintiff is obliged to meet the order. The agreement does not contain any such provision for a confirmation. That argument must surely fail. The case has another twist on this crucial point. Learned counsel for the plaintiff should surely as a complete answer to the defendant's allegation of failure to supply the products have referred the court to cl 4.2.1 which gives the plaintiff the right 'to decline to accept any order received from' the defendant. Fear not that he had not done so because learned counsel for the defendant had referred to this provision and, I am of the view, that it must be because of that provision that he made such a cursory statement regarding the defendant's claim. It is obvious that the defendant cannot succeed at all.

The defendant had claimed for loss of profit for the remaining period of the agreement which the defendant alleged she would have earned if not for the termination of the agreement and this was stated to be RM190,000. The learned counsel for the defendant had only this to say about the damages suffered by the defendant:

> (8) Whether defendant suffered:
>
> (1) Damages; and
> (2) Loss of profit amounting to RM190,000.
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> The defendant and her family moved to Kuching in 1995 in order to market the plaintiff's products. When the plaintiff terminated the agreement in December 1996 the defendant has to dispose of the branches. It is therefore submitted that the defendant has suffered losses.

Surely, learned counsel must take me through the evidence and say what are those that support the allegation that there was this loss of profit of RM190,000. This would mean establishing at least the fact that the defendant was making such and such a sum when she was selling the plaintiff's products and thus if she had continued she would have made that sum. If moving to Kuching had caused damages, how was that so. There is no such evidence and that is why counsel for the defendant said so little which in substance was nothing. In the end, even if there was a breach of the agreement by the plaintiff, the defendant had not adduced any evidence of damages. I cannot help recalling what was said in Singapore about a great number of cases in Singapore that should not have seen the doors of the court. This is one of those cases that should not have seen the doors of our court.

A *Conclusion*

Both parties having failed in their respective claims I therefore ordered that the claim and the counterclaim be dismissed with costs. Since both have failed, there should be no order as to costs.

B *Plantiff's claim and defendant's counterclaim dismissed.*

Reported by Benjamin Yong

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